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LEGAL ETHICS

'My Client Didn't Mean That'

Protecting clients from themselves

By Marc Garfinkle

Clients hire lawyers for many reasons. They use us to define their legal needs and to help them achieve their concrete goals in a complex world. They need us to educate them and to help them navigate strange waters. As draftspersons, advisors, advocates, strategists, notaries, researchers, negotiators, spokespersons or psychologists, we lend them our mouths, our pens and our judgment.

Above all, clients need lawyers to protect them. They need us to look around corners and behind closed doors for them. They count on us for protection against risks known and unknown, common and uncommon, foreseeable and unforeseeable.

One foreseeable problem is the flawed nature of clients themselves. But the question often arises: To what extent must we protect our clients against their own ignorance and imperfections?

Which lawyer has not had a case whose Achilles' heel was the client herself? Any client that is unreasonable, immature, dishonest, intemperate, greedy, vindictive, undereducated, unlikable, stubborn, biased, unprincipled or ignorant can easily derail our noblest efforts. Since most clients have one or more of those characteristics in varying proportions, it is important for us to be realistic about their propensities. Where possible, we compensate for our clients' shortcomings. Sometimes, in so doing, we take unnecessary risks.

What litigator has not fallen on her sword in court for a client? Which negotiator has not claimed a client's gaffe as his own? Which advocate has not, at some time, adopted some sort of artifice to prevent a client from looking bad or from undermining his own cause? Who has not revealed to a friendly adversary an incidental confidence or an embarrassing fact about a client in the greater interest of resolving the bigger issue? Who has not decided to wait for a "better time" to tell something crucial to a client?

Although few lawyers are ever brought to task for such well-intended acts, it is important to consider the ethical issues that are frequently involved.

> RPC 1.2 *Scope of Representation and Allocation of Authority Between Lawyer and Client*
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> A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, … and as required by RPC 1.4, shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter…
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> RPC 1.4 *Communication*
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> [...]
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> (b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
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> (c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
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> RPC 1.6. *Confidentiality of Information*
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> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ….
>
> RPC 4.1. *Truthfulness in Statements to Others*
>
> (a) In representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person; ….

The ethical questions arise innocently. Imagine a two-party accident case involving an injury which has been evaluated by both parties at $75,000 to $85,000, liability aside, for settlement purposes. Issues include comparative negligence and the necessity of treatment. You represent the plaintiff.

At the initial interview, you told him that you cannot accept or reject any reasonable settlement offer without his consent. Like most clients, he replied that you are the expert, that he has no clue what his case is worth, and that he will defer to your judgment when the time comes. That was then. Ever since then, he has been sending you clippings of seven-figure verdicts from other jurisdictions involving dissimilar injuries, "FYI."

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Although you still have had no offer two days before trial, you are certain there will be no trial. There is a $100,000 policy limit, and you have your *Rova Farms* notice in place, exposing the carrier to unlimited liability for failure to reasonably settle within policy limits. (You have warned your client to expect substantially less.) Your adversary, whom you know well, has assured you that the carrier will "come up with some real money at the last minute, like the last time," and he confides that "there is an adequate reserve." Moreover, the judge who will conference the case is a great settler of cases.

You have told your client that you will keep him "in the loop." The afternoon and evening before trial, you and your adversary are busy on the phone with a half-dozen back-and-forths. Finally, you receive his "first and final" offer of $67,500. It is worth taking. You are certain that there is no more. You told your adversary that you would "make" your client accept the offer. You know that if *you* don't, the judge will.

You fear that if you tell your client of the $67,500 offer, he will not be satisfied; he will probably now insist on $75,000 or more. So you say, "Look, they are at 55 now, and I am at 75. I recommend that you that you *not* take the 55—I think they have at least 10 more in their pocket. If they get over 65 or 70, you should take it." Predictably, the client rejects the 55. You wait a while, then call the client back and tell him that you got defendant's last dollar—$67,500. The client is pleased to accept the offer, and pleased with your services. If only he knew….

Now, represent the defendant as retained counsel. The carrier is a long-time client. The adjustor on this case is new. She is also new to your jurisdiction. The previous adjustor had told you that there is a $75,000 reserve, but the new one has not given you any authority at all to settle. She says that any decent lawyer should be able to defend the claim. Worse, she wants you to ask the judge to excuse you from future settlement conferences, as she finds them pointless and expensive. You do not make that request.

You know the case will settle. Plaintiff's counsel is reasonable, and the carrier's risk under *Rova Farms* is untenable. Besides, you know this particular judge very well. She hits the roof during conferences with carriers who come to court empty-handed. She has scheduled a settlement conference before trial, and wants the "person with the purse" in court or available by phone.

A preconference form circulated by the court requests your evaluation of the case and any potential obstacles to settlement. You indicate your evaluation and state that you know of no obstacles to settlement, beside the sticky liability and damages issues.

The judge also wants to know what offers have been made prior to the conference. Although you admit that you have no settlement authority yet, you do not mention your adjustor's stated position to the judge. You know that, toward the last minute, you will get the authority to make a reasonable offer. You have even told that to your adversary, and revealed that there is an adequate reserve.

At the settlement conference, with the adjuster available by phone, you tell the judge, "There's been a shake-up at the carrier, and I've got a new adjustor from another jurisdiction, Your Honor. She settles cases differently than we usually do around here, but she's a pro, she's reasonable, and I happen to know that there is a decent reserve on the file."

The judge worked her usual magic, you prevailed upon the adjustor, the plaintiff accepted, and the case settled as it was supposed to. Good result all around. No harm, no foul? Not necessarily.

Every day, we attorneys stick our necks out for our clients. Every day, we attorneys try to protect clients from their own ignorance, folly or flaw. But, colleagues: beware. The RPCs define clearly our responsibilities to clients, courts and third parties. They are not to be taken lightly.

Our well-intended efforts to assist or protect our clients can put us in harm's way. To make it worse, our clients rarely appreciate those efforts, anyhow. Professionalism makes pressing demands upon us. Practicality and "common sense" make other demands. Our exigencies can be our undoing.

Remember that the RPCs do not apply to clients—they only apply to *us.* Neither does the rule of "No harm, no foul" apply. The half-truth, the failure-to-mention, the end-around and the minor breach of confidentiality are no less problematic merely because the lawyer was well-intended or because lawyers do it all the time. Be aware that there are hidden dangers.

The practice of law is fraught with pitfalls. "Problem clients" are among them. You cannot avoid them. But how far should you stick out your neck to protect them against their own foibles? Protect your client as you must, counsel, but be wary—the client already needs a lawyer; you don't. Keep it that way. ■